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In The
Supreme Court of the United States
October Term, 1999

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.3 of this Court, the Institute for a Drug-Free Workplace ("the Institute"), by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, Eastern Associated Coal Corporation.* In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to

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* Prior to filing this Motion, the Institute sought the consent of the parties to the filing of its brief, as required by Rule 37.3 of this Court. The Petitioner consented to the Institute's request. The Institute was unable to contact the Respondents, necessitating this Motion.

promoting and protecting the interests of employers and employees in effective and responsible drug-abuse prevention programs.

In this regard, the Institute disseminates information to assist in the development of workplace drug-abuse prevention and treatment programs, and participates in various forums – including legal, regulatory, and legislative forums – on the development of the law on workplace substance-abuse prevention throughout the United States. The Institute has developed an enormous collection of resources on current laws, regulations, and workplace policies and practices regarding substance-abuse prevention. In addition, the Institute has extensive information on the successes and failures of workplace substance-abuse programs and what measures have proven most effective.

The Institute believes that its *amicus curiae* participation will benefit the Court in this proceeding. The Institute and its members bring a unique "hands-on" perspective to the consideration of the efficacy and value of meaningful workplace drug-testing programs. Its members have implemented such programs and applied them to sizable portions of the nation's work force and, thus, have substantial experience with the benefits of effective programs. Accordingly, the Institute and its members can provide important input on the critical policy issues involved in this case which the Court should consider.

WHEREFORE, the Institute for a Drug-Free Workplace respectfully requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae* in support of the Petitioner.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

May 4, 2000

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**On Writ of Certiorari to the
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BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible drug-abuse prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist in the development of workplace drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute is uniquely positioned to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an arbitration award reinstating an employee, who has repeatedly tested "positive" for illegal drug use, to a safety-sensitive position does *not* violate public policy, the U.S. Court of Appeals for the Fourth Circuit has failed to recognize the increased likelihood that the employee's drug-related impairment could cause or contribute to an accident and the potentially catastrophic consequences of such an accident. The decision inappropriately and unjustifiably undermines employers' ability to provide safe workplaces, and to take necessary steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that the disciplinary component of their drug-free workplace policies cannot be evaded by employees who – like the employee in this case – claim to have temporarily relapsed into illegal drug use because of a "personal/family problem." A policy of mandatory reinstatement of a safety-

sensitive employee who tested "positive" for marijuana, if not reversed by this Court, would drastically diminish the positive deterrent effect that drug-free workplace programs have on employee substance abuse.

INTRODUCTION AND SUMMARY

The Fourth Circuit's decision to uphold the arbitrator's award reinstating former employee James Smith ("Mr. Smith") violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. As the First, Third, Fifth, Eighth, and Eleventh Circuits have recognized, prohibiting reinstatement of safety-sensitive employees who have tested "positive" for illicit drug use is a logical and necessary application of that public policy. That public policy – grounded in concerns relating to public, environmental, and workplace safety – is of overriding importance, and requires that the Fourth Circuit's decision be reversed.

Petitioner's employee, Mr. Smith, was a Mobile Equipment Operator. That position required a Commercial Driver's License, and thus Mr. Smith was subject to drug and alcohol testing under the U.S. Department of Transportation's regulations. In addition, Petitioner's drug-free workplace policy requires all employees to submit to random drug testing. Petitioner's policy provided that a driver who tests "positive" for illegal drugs will be removed from any safety-sensitive position and subject to disciplinary action up to and including termination.

In March 1996, Mr. Smith tested "positive" for marijuana, and Petitioner suspended him with the intent to discharge him. Mr. Smith grieved Petitioner's action. An arbitrator reinstated Mr. Smith on the condition that he participate in a substance-abuse treatment program and

submit to random drug testing for the following five years. Less than a year and a half after his first "positive" test, Mr. Smith tested "positive" for marijuana again. Petitioner suspended Mr. Smith, who grieved the impending discharge through his union, the Respondents in this case. The arbitrator reinstated Mr. Smith, finding credible his testimony that "a personal/family problem… caused this one time lapse in drug usage." Seemingly acknowledging the danger of reinstating Mr. Smith, the arbitrator noted "[i]f the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."

Petitioner filed a lawsuit to vacate the arbitration award in the U.S. District Court for the Southern District of West Virginia, which ruled that the arbitration decision be enforced. Petitioner appealed that decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision. Petitioner requested rehearing and rehearing *en banc*, which were denied.

The same safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly for employees working in safety-sensitive positions, support a broad public policy against reinstating employees who have failed drug tests to safety-sensitive positions. Reinstatement to a safety-sensitive position violates public policy by compromising multiple, compelling safety interests. Such a conclusion clearly violates public policy by undermining the myriad requirements that lawmakers and employers have adopted to ensure that substance abusers are not employed in these positions. Despite this well-defined public policy against reinstatement of safety-sensitive employees who have tested "positive," the Fourth Circuit upheld the reinstatement of Mr. Smith to his safety-sensitive position. If this arbitration had been held in the First, Third, Fifth,

Eighth, or Eleventh Circuit, the award would have been vacated.

For these reasons, the Institute urges this Court to recognize that public policy forbids the reinstatement of substance abusers to safety-sensitive positions, and to reverse the decision of the Fourth Circuit.

ARGUMENT

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

This Court, the Executive Branch, the Legislative Branch, numerous lower federal courts, and state legislatures and courts have articulated a consistent and forceful legal doctrine that to permit safety-sensitive employees to engage in illicit drug and alcohol use – including reporting to work with a detectable amount of drugs or alcohol in one's system – would violate public policy.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers from safety-sensitive positions. This policy has been expressed explicitly again and again through a large volume of federal court decisions, Executive Orders, federal legislation, federal regulations, state court decisions, and state legislation.

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), recognized the public policy against allowing impaired employees to work in safety-sensitive positions – such as the one Mr. Smith held at Eastern Associated Coal Corporation.

In *Skinner*, this Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing, despite the Constitutional prohibition against the government conducting unreasonable searches of individuals.

Similarly, in *Von Raab*, this Court held that U.S. Customs agents who carry firearms could be subject to mandatory drug testing because of the dangers associated with the possible impairment of agents in these positions.

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

The policy against employing substance abusers in safety-sensitive positions also has been incorporated into federal law by the Executive and Legislative Branches. Executive Order 12,564, issued by President Reagan in 1986, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace program.

In 1988, Congress enacted the Drug-Free Workplace Act, which requires federal contractors and grantees to establish a

drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. § 702(a) (1994).

Congress next enacted (by wide vote margins in both the Senate and the House of Representatives) the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331 (1997). Pursuant to this law, the Department of Transportation, through its five operating agencies, established mandatory substance-abuse prevention requirements for 8.1 million workers in safety-sensitive, transportation-related positions in the private sector (including, of course, Mr. Smith's position). The Federal Aviation Administration ("FAA"), the Research and Special Projects Administration ("RSPA"), the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and the Federal Transit Administration ("FTA") promulgated detailed regulations in this area, all of which reflect the policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations – and all of which require the *removal* of employees who test "positive" from such positions.[2]

The Department of Energy ("DoE") and Department of Defense ("DoD") also have issued regulations to ensure that safety-sensitive jobs are not performed by drug abusers. DoE and DoD contractors must have programs to identify those who engage in illicit drug use, including testing of

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[2] *See* 14 C.F.R. Part 121, Appendices I and J (2000) (FAA); 49 C.F.R. Part 199 (1999) (RSPA); 49 C.F.R. Part 219 (1999) (FRA); 49 C.F.R. Part 382 (1999) (FHWA); 49 C.F.R. Parts 653 and 654 (1999) (FTA).

employees who perform sensitive functions – that is, functions that pose dangers to public health and safety.[3]

C. State Legislatures and Courts Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

A vast majority of the states also have recognized this public policy in one way or another. Many state legislatures have enacted statutes encouraging and rewarding employers who implement drug-free workplace programs including drug testing, by disqualifying substance abusers from receiving unemployment and workers' compensation benefits.

For example, 24 state unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in many other states faced with a worker

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[3] See 10 C.F.R. Part 707 (2000); 48 C.F.R. Part 252.223-7004 (1999); *see also* 48 C.F.R. Part 1852 (1999) (National Aeronautics and Space Administration drug-testing requirements for contractors); 10 C.F.R. Part 26 (2000) (Nuclear Regulatory Commission drug-testing requirements for nuclear plant employees).

[4] *See, e.g.*, ALA. CODE § 25-4-78 (Supp. 1998); ARIZ. REV. STAT. § 23-619.01 (1993); CAL. UNEMP. INS. CODE § 1256.5 (West Supp. 1999); FLA. STAT. ANN. § 443.101 (West 1997 & Supp. 1999); GA. CODE ANN. § 34-8-194 (Michie 1998); LA. REV. STAT. ANN. § 23:1601(10) (West Supp. 1999); VA. CODE ANN. § 60.2-618(2)(b) (Michie 1998); W. VA. CODE § 21A-6-3 (1996).

dismissed for drug or alcohol use have denied claims for unemployment benefits.[5]

Similarly, 45 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to his or her own drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts have denied alcohol- and/or drug-impaired employees these benefits.[7]

While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should *not* be permitted to recover compensation for job loss or for injury when they intentionally endanger themselves and others by using drugs and alcohol.

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[5] *See, e.g., Risch v. State*, 879 P.2d 358 (Alaska 1994); *Clevenger v. Employment Sec. Dep't*, 770 P.2d 866 (Nev. 1989); *Warren v. Employment Sec. Dep't*, 724 P.2d 227 (N.M. 1986).

[6] *See, e.g.*, ALA. CODE § 25-5-51 (1992); CAL. LAB. CODE § 3600 (West 1989 & Supp. 1999); FLA. STAT. ANN. § 440.09 (West 1993); GA. CODE ANN. § 34-9-17 (1998); LA. REV. STAT. ANN. § 23:1081 (West 1998); MISS. CODE ANN. § 71-3-7 (1995); TEX. LAB. CODE ANN. §§ 406.032 & 401.013 (West 1996); VA. CODE ANN. § 65.2-306 (Michie 1995); W. VA. CODE § 23-4-2 (Supp. 1998).

[7] *See, e.g., Parro v. Industrial Comm'n of Illinois*, 657 N.E.2d 882 (Ill. 1995).

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO WORKPLACE, PUBLIC, AND ENVIRONMENTAL SAFETY.

The First, Third, Fifth, Eighth, and Eleventh Circuits all have ruled that arbitration awards reinstating employees who have tested "positive" for illicit drug use to safety-sensitive positions violate public policy.[8] However, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion.[9]

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit

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[8] *See Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pac. R.R. Co. v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665 (11th Cir. 1988).

[9] *See IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998); *Eastern Associated Coal Corp. v. United Mine Workers of America*, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999); *Tennessee Valley Auth. v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999); *United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

drug users are employed.[10] The U.S. Department of Health and Human Services has estimated that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[11]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial – and sometimes tragic – human, economic, and environmental costs.

In addition, these companies have a statutory duty under the Occupational Safety and Health Act to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1999).

Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. When catastrophic events occur due to drug or alcohol use by employees in safety-sensitive positions, the financial consequences can be staggering.

Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that is a realistic threat.

Drug and alcohol use are known to substantially impact workplace safety. For example, drug-using employees were

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[10] According to the most recent government figures, 73 percent of all current illicit drug users are employed. Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1998 National Household Survey on Drug Abuse* (Aug. 1999).

[11] U.S. Department of Health and Human Services, *National Drug Survey Results Released with New Youth Public Education Materials* (Sept. 12, 1995).

found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs.[12] In addition, a Utah Power and Light study estimated that employees testing "positive" on drug tests were five times more likely to be involved in a vehicle accident than those who tested "negative."[13]

Studies also show that workplace fatalities are frequently attributable to employee drug and alcohol use. An analysis of truck drivers killed in over-the-road vehicle accidents found that 33 percent of the drivers had detectable concentrations of psychoactive drugs or alcohol in their systems.[14] In addition, illicit drugs or alcohol were found in one-sixth of workers who were fatally injured in 1992.[15]

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[12] Thomas E. Backer, *Strategic Planning for Workplace Drug-Abuse Problems*, National Institute on Drug Abuse, at 4 (1987).

[13] Dennis J. Crouch, et al., *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 169, 186 (1989); *see also Occupational Health Programs React As Some Employees Decide Drug Testing Doesn't Work*, Occupational Health Management, Mar. 1994, at 33 (employees who tested "positive" for drugs are 60 percent more likely to be responsible for plant accidents than those who have not); David L. Durbin, *Alcohol Consumption and Workplace Accidents*, NCCI Digest, Dec. 1991, at 39 (five states with the highest alcohol consumption have 33 percent higher average workers' compensation costs).

[14] Dennis J. Crouch, et al., *Prevalence of Drugs and Alcohol in Fatally Injured Truck Drivers*, 38 J. Forensic Sci. 1342 (1993).

[15] William M. Marine and Tracy Jack, *Analysis of Toxicology Reports from the 1992 Census of Fatal Occupational Injuries*, Compensation and Working Conditions, Oct. 1994, at 2; *see also* Glenna Kay Twing, *Working High: When Employees Take Hits, So Do Profits*, Journal of Property Management, Nov.-Dec. 1995,

Given the magnitude of the nation's drug- and alcohol-abuse problem, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 4.8 percent of the 5.7 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1998 tested "positive."[16]

Of more direct relevance, out of more than 650,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.4 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 22,100 individuals in safety-sensitive jobs in the transportation industry who *knew* they were subject to drug testing *still* tested "positive" for illicit drug use.

Furthermore, in a national survey of employees, 35 percent of full-time employees interviewed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done."[17] In addition, 59 percent agreed that alcohol abuse is a major workplace problem.

Studies have documented declines in workplace accidents after substance-abuse problems were reduced or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that

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at 20 (up to 40 percent of industrial fatalities can be attributed to substance abuse).

[16] SmithKline Beecham, *SmithKline Beecham Drug Testing Index* (Mar. 16, 1999).

[17] *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization, Princeton, New Jersey (Nov. 1995).

where substance-abuse testing was implemented, workplace accidents declined by 34 percent.[18] In addition, Utah Power & Light experienced 27 percent fewer vehicle accidents in the first year that employees were subject to drug testing and 31 percent fewer vehicle accidents the next year.[19]

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut by implementation of substance-abuse detection programs. For example, the U.S. Postal Service and Georgia Power Company found that they could have saved $105 million and $1.7 million, respectively, by discharging employees who failed drug tests.[20]

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from these well-documented risks. If arbitrators and courts effectively mandate that a safety-sensitive employee who tests "positive" for illegal drugs *twice* should be reinstated, they will frustrate the underlying purposes of these laws, regulations, and policies, and place the public at much greater risk.

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[18] National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

[19] Dennis J. Crouch, et al., *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 169, 187 (1989).

[20] United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992); John Sheridan & Howard Winkler, *An Evaluation of Drug Testing in the Workplace*, Drugs in the Workplace: Research and Evaluation Data, National Institute on Drug Abuse, at 195-216 (1989).

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use.

For a drug-testing program to be effective, there have to be appropriate sanctions which employees *know* will result if they violate the policy. A survey of the Institute's members found that 70 percent of the companies *always* terminate employees for a second "positive" test.[21] In addition, a survey of the Institute's members in the oil and chemical industries found that 82 percent terminate employees for a second "positive" test, and 94 percent sometimes terminate employees for a first "positive" test.[22]

If safety-sensitive employees must be reinstated after a second "positive" drug test, their employers' drug-free workplace policies are rendered impotent. They essentially have no deterrent effect, and the detection impact is greatly reduced as a segue to rehabilitation opportunities.

Thus, the perpetuation of such a precedent would destroy the value of workplace drug-testing programs. If drug-abusing employees know they can be caught without there being adverse consequences, they will not fear being caught. Thus, the incentives to stop engaging in illicit drug abuse – or not to start – would be eviscerated.

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[21] Institute for a Drug-Free Workplace. *"Member Survey: Corporate Drug and Alcohol Policies and Programs."* Washington, D.C. (1994).

[22] Institute for a Drug-Free Workplace. *"Oil and Chemical Industries Survey of Corporate Substance-Abuse Prevention Programs and Policies."* Washington, D.C. (1996).

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears.

Drug addiction and alcoholism are chronic diseases, and the possibility of relapse at any given time is both real and unpredictable. Medical evidence shows that for addicted individuals who seek rehabilitative services, the recidivism rate is disturbingly high. One study of alcohol recidivism, for example, reported that approximately 90 percent of alcoholics are likely to experience at least one relapse over the four-year period following treatment.[23]

A good-faith attempt by highly motivated individuals to cease the use of abusive substances does not guarantee a cure: in a 15-year study of alcoholics who were able to abstain for two years, 41 percent later relapsed, many after more than a decade of abstinence.[24]

Success in overcoming drug dependency is even more elusive. A nationally representative longitudinal study of drug users showed that five years after completing rehabilitation, the treated individuals reported a 21 percent decline in the use of any illicit drug – meaning that 79 percent continued to use drugs at least at the same rate as they did before treatment.[25] Another recent study reported

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[23] J. M. Polich et al., Stability and Change in Drinking Patterns, The Course of Alcoholism: Four Years After Treatment, 159-200 (1981).

[24] George Vaillant, M.D., *A Long-Term Follow-Up of Male Alcohol Abuse*, Archives of General Psychology, Volume 53 (Mar. 1996).

[25] The study analyzed the success rates of in-patient, out-patient, and a variety of other types of rehabilitation programs. Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Services Research Outreach Survey* (1998). The

that approximately 55 percent of people with chemical dependency are prone to relapse at some time.[26]

While these figures demonstrate that some substance abusers may benefit from treatment, they in no way support a conclusion that a former drug user who is able to return to work is cured. In short, *no one* can guarantee that an alcoholic, or a drug addict or chronic drug abuser, can abstain, will abstain, or will – or will not – relapse. Nor can one say when and under what circumstances relapse will occur.

What treatment professionals *can* predict is that relapse: (1) is *more* likely to occur during times of heightened tension or pressure (including on-the-job stress),[27] (2) is *often* linked to interpersonal conflicts (which may arise away from work and of which the employer is unlikely to have knowledge),[28] and (3) is *more* likely to occur when the historically substance-abusing individual is in isolation or relative isolation (such as in a job without on-going direct supervision).[29]

Significantly, in a world where the majority of individuals with substance-abuse problems have few or no treatment options – or, at most, are offered three months of rehabilitative services – 85 percent of those who *began* the highly regarded and well-funded addiction-treatment

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study is accessible through SAMHSA's web site at http://www.samhsa.gov.

[26] M. Dusoe, *The Use of Self-Efficacy Training in the Treatment of Relapse-Prone Individuals*, EAPA Exchange, at 6 (Feb. 1995).

[27] R.L. Rogers & C.S. McMillan, Relapse Traps: How to Avoid the 12 Most Common Pitfalls In Recovery (Bantam Books 1991).

[28] A. Beck *et al.*, Cognitive Therapy of Substance Abuse (1993).

[29] *See* n.27.

program at Phoenix House were unable to complete the two-year treatment.[30]

While no doctor, employee assistance professional, or counselor can *ever* determine that *any* individual is fully recovered and/or rehabilitated – nor can anyone predict or prevent a relapse with any certainty – all reach one universal conclusion: the rate of relapse *always* will be higher than the rate of first-time drug addiction or alcoholism. The bottom line is irrefutable: those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history.[31]

The undeniable truth is that an historically addicted individual may relapse into self-destructive addictive behavior without obvious signs or warning, at any time, even after years of sobriety or abstinence. If that individual's job includes safety-sensitive responsibilities, as Mr. Smith's did, the consequences of a relapse could be disastrous.

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy.

Reinstatement of Mr. Smith would subvert public policy, and send a jarring signal to employers that work diligently – and successfully – to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy endorsed by all levels and branches of government, the Fourth Circuit's holding – unless reversed – would frustrate

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[30] "*Traditional Drug Programs Face Up to Chronic Recidivism*," Washington Post (Aug. 20, 1990).

[31] *See* n.24.

employers' efforts to protect all at-risk parties and interests from potentially catastrophic harm. It would condone employee misconduct – illegal drug use – and undermine a legitimate and widely accepted tool for achieving the critical social goal of drug-abuse prevention.

The ruling of the Fourth Circuit in this proceeding inappropriately subordinates the compelling interest of keeping drug abusers out of safety-sensitive positions. It would improperly insulate employee action at odds with the goal (substance-abuse prevention) and methodology (testing and disciplinary action) widely embraced by both the public and private sectors, and would otherwise tend to perpetuate the harm which public policy seeks to avoid.[32]

Employer practices throughout the country have proven that comprehensive drug-testing and drug-abuse prevention programs with known, uniform consequences are the most effective means of preventing the harm that employee drug abuse can cause. The effectiveness of drug testing, however, is *severely* compromised when employees terminated for illegal drug use are reinstated. The current unpredictability – and sometimes irrationality – of arbitration decisions in this regard fundamentally undermines the effectiveness of workplace drug testing.

Clear tenets of public policy argue against allowing impaired employees and employees who test "positive" for illicit drug use to perform safety-sensitive jobs. The Institute urges the Court *not* to frustrate employers and employees in their efforts to achieve drug-free workplaces. The Court should preserve employers' rights to have meaningful and

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[32] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

effective drug-testing programs, and to terminate safety-sensitive employees for "positive" drug tests.

In summary, if the Fourth Circuit's decision is not reversed, drug testing will be much less effective at deterring drug abuse. There will be *more* drug abuse by employees, a *substantial* compromise of workplace safety, and an undermining of *most* employers' current substance-abuse prevention programs. A policy which results in *more* drug abuse cannot be a good thing. Protecting the rights of the "James Smiths" of our society to continue to engage in dangerous and illegal behavior, while neglecting the rights of others *not* to be endangered by the continued employment of a known, repeated drug abuser in a safety-sensitive position is the height of illogic. It is wrong. The Fourth Circuit was wrong. The U.S. Supreme Court should right this wrong.

III. REVERSAL OF THE FOURTH CIRCUIT'S DECISION IS NECESSARY TO PREVENT FUTURE DRUG- AND ALCOHOL-RELATED WORKPLACE TRAGEDIES.

The devastating effects of alcohol- and drug-impaired employees are, unfortunately, widespread – and sometimes are well-publicized.

For example, on February 13, 2000, a light rail train at Baltimore-Washington International Airport crashed into a steel barrier, injuring 22 passengers. The train operator admitted to being under the influence of prescription drugs at the time of the crash and subsequently was fired from his job. The results of drug tests revealed that he also had recently used cocaine. The train operator had been involved

in at least one prior accident while operating a light rail train.[33]

Another recent example occurred on May 9, 1999, when a tour bus carrying nursing home residents veered across three lanes of traffic and crashed into a concrete and dirt embankment. Twenty-two of the passengers were killed. At the hospital after the accident, the driver tested "positive" for marijuana. Later investigation revealed he previously had been discharged from two bus driver jobs after he tested "positive" and failed successfully to complete rehabilitation. He also had tested "positive" for cocaine on a preemployment drug screen administered by Greyhound.[34]

Another highly publicized fatal accident involving a drug-impaired employee occurred on April 15, 1998, when a truck driver drove a gasoline tanker filled with 9,100 gallons of fuel off the road and through the fence of an asphalt refinery in Portland, Oregon. The driver died in the crash, and toxicology tests showed that he had alcohol, cocaine, marijuana, and methamphetamines in his system.[35]

In fact, the impetus for Congressional action on required drug and alcohol testing for employees in safety-sensitive, transportation-related jobs came from two fatal disasters caused by drug-impaired employees.

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[33] Lyndsey Layton and Don Phillips, *Drug Use Cited in Crash of BWI Train*, Wash. Post, Feb. 24, 2000, at B1; Matthew Mosk, *Driver in BWI Train Crash Had Prior Rail Accidents*, Wash. Post, Feb. 25, 2000, at B1.

[34] Kristen Delguzzi, *Driver Fired Twice For Drug Use*, New Orleans Times Picayune, May 14, 1999, at A1.

[35] Maxine Bernstein, *Trucker in Wreck Had Drugs in System*, The Oregonian, Apr. 30, 1998, at 5.

First, on January 4, 1987, a high-speed Amtrak passenger train collided with three Conrail locomotives at a junction in Chase, Maryland. Sixteen people were killed, 170 people were seriously injured, and $19 million in damages were caused. The engineer and brakeman of the Conrail locomotives both tested "positive" for marijuana after the accident.[36]

Subsequently, on August 28, 1991, a subway train in New York City derailed, killing 5 people and injuring more than 200 people. The subway motorman was legally drunk and ran the subway across a switch at high speed. In addition, an empty vial with traces of crack was found in the cab of the train. The motorman, who was not injured in the accident, was charged with manslaughter.[37]

If this Court affirms the Fourth Circuit's decision that reinstatement of a safety-sensitive employee who has tested "positive" for illicit drug use does not violate public policy, James Smith may well be the perpetrator of the next catastrophic drug-related workplace accident.

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Supreme Court to reverse the rulings that would require the reinstatement of James Smith despite his recurring illegal conduct and violations of company policy – specifically, his repeated "positive" drug tests – and to recognize that his mandated reinstatement would be a clear and indefensible violation of public policy.

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[36] Reginald Stuart, *Drug Trace Found in 2 Rail Workers After Fatal Crash*, N.Y. Times, Jan. 15, 1987, at A1.

[37] Alan Finder, *IRT Driver Charged in 5 Deaths; Crash Shuts Line and Ties Up City*, N.Y. Times, Aug. 29, 1991, at A1.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

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